

IN THE **CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT**
IN AND FOR **MANATEE COUNTY, FLORIDA**
CIVIL DIVISION

GREEN LIFE LUXURY HOMES, LLC, a
Florida limited liability company,

Plaintiff,

vs.

CASE NO.: 16-CA-005174

KENNY WINTERHALTER, a natural person, and
MARSHA WINTERHALTER, a natural person,

Defendants.

DEFENDANTS', KEN WINTERHALTER AND MARSHA WINTERHALTER,
AMENDED COUNTERCLAIM

Defendants, Ken Winterhalter and Marsha Winterhalter (“the Winterhalters”), by and through their undersigned attorneys, hereby bring this amended counterclaim against counter-defendant, Green Life Luxury Homes, LLC (“Green Life”), and in support states as follows:

Jurisdiction, Venue, and Parties

1. **Counter-Plaintiffs.** The Winterhalters are natural persons residing in Manatee County, Florida.
2. **Counter-Defendant.** Green Life is a Florida limited liability company with its principal place of business in Sarasota, Florida.
3. **Subject Matter Jurisdiction.** This Court has subject matter jurisdiction under Chapter 26 of the Florida Statutes as the amount in controversy

is in excess of \$15,000.00. Further, the Winterhalters seek the entry of a temporary and permanent injunction.

4. **Venue.** Venue is proper under Chapter 47 of the Florida Statutes as Wachovia has brought the main action in Manatee County Circuit Court.

5. **Conditions Precedent.** All conditions precedent to have occurred or been waived in order for Aurora to recover in this action.

6. **Attorney's Fees.** The Winterhalters have retained the undersigned law firm, and are obligated to pay the law firm a reasonable fee.

General Allegations

7. **Contract.** On or about May 30, 2014, the Winterhalters and Green Life entered into a Standard Form of Agreement Between Owner and Contractor (the "Contract") where the basis of payment is the cost of work plus a fee without a guarantee maximum price for the construction of a new single family home (the "Project") at 1707 71st St NW, Bradenton, FL 34209 (the "Property"). The Contract incorporates the AIA A201-2007 General Conditions of the Contract for Construction (the "General Conditions"). A copy of the Contract and the General Conditions are attached hereto and incorporated herein as Exhibit "A."

8. **Control Estimate.** In accordance with the Contract, Green Life provided the Winterhalters with a control estimate for construction costs of the Project.

9. **Contractual Provision Regarding Control Estimate.** Pursuant to Section 5.2.1 of the Contract, Green Life was responsible for updating the Control Estimate with each Application for Payment as needed to reflect changes in the

work. Furthermore, pursuant to Section 5.2.5 of the Contract, Green Life was required to develop and implement a detailed system of cost contract that will provide the Owner and Architect with timely information as to the anticipated total Cost of the Work. The cost control system shall compare the Control Estimate with the actual cost for activities in progress and estimated for uncompleted tasks and proposed changes. This information shall be reported to the Owner, in writing, no later than the Contractor's first application for payment and shall be revised and submitted with each application for payment.

10. Contractual Provision Regarding Applications for Payment.

Pursuant to Section 12.1.4 of the Contract, with each application for payment, Green Life shall submit the cost control information required in Section 5.2.5 along with, payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by Green Life on account of the Cost of Work equal or exceed (1) progress payments already received by the Contractor; less (2) that portion of those payments attributable to the Contractor's Fee; plus (3) payrolls for the period covered by the present application for payment. Section 12.1.5 provides that the applications for payment shall show the cost of the work actually incurred by the Contractor through the end of the period covered by the Application for Payment and for which the Contractor has made or intends to make actual payment prior to the next application for payment.

11. Contractual Provisions Regarding Change Orders. Pursuant to Section 3.4.2 of the General Conditions, except in the case of minor changes in

the Work authorized by the Architect in accordance with Sections 3.12.8 or 7.4, the Contractor may make substitutions to labor and materials only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order or Construction Change Directive. Section 3.8.1 of the General Conditions states that the Contractor shall include in the contract sum all allowances stated in the contract documents. Section 3.8.2.3 provides that whenever costs are more than or less than allowances, the contract sum shall be adjusted accordingly by a change order. Section 7.1.2 of the General Conditions provides that a change order shall be based upon agreement among the Owner, Contractor and Architect.

12. **Payments to Green Life.** As of the filing of this lawsuit, the Winterhalters have paid Green Life \$1,590,141.17.

13. **Payments to Green Life for Roofing Subcontractor Work.** The Winterhalters have paid Green Life for work performed by Latite Roofing & Sheet Metal ("Latite Roofing"), the roofing subcontractor on the Project. Upon information and belief, Green Life did not pay Latite Roofing. As a result, Latite Roofing filed a lien against the Property. A copy of Latite Roofing's lien is attached hereto and incorporated herein as Exhibit "B."

14. **Payments to Green Life for Window Subcontractor Work.** The Winterhalters have paid Green Life for work performed by Window and Door Design Center of Sarasota, the window subcontractor on the Project. Upon information and belief, Green Life did not pay Window and Door Design Center of Sarasota. As a result, Window and Door Design Center of Sarasota filed a lien

against the Property. A copy of the Window and Door Design Center of Sarasota lien is attached hereto and incorporated herein as Exhibit "C."

15. **Green Life's Failure to Pay Subcontractors Resulted in Damage to The Winterhalters.** In addition to the issues with Latite Roofing and Window and Door Design Center of Sarasota, other subcontractors complained to the Winterhalters that they were not being paid by Green Life. Some of the subcontractors walked off the Project due to Green Life failing to pay the subcontractors. These actions by Green Life resulted in the Winterhalters incurring additional costs and resulted in additional time being added to the Project.

16. **Green Life's Failure to Provide Documentation Required by The Contract for Payment.** Throughout Green Life's work at the Project, Green Life continuously failed to provide documentation in support of its applications for payment. In addition, Green Life has failed to account for funds that were paid to Green Life without providing any support for what Green Life did with the funds.

17. **September 17, 2016 Application for Payment and Change Order.** On or about September 17, 2016, Green Life issued an application for payment which included a change order to the Winterhalters (the "September 2016 Application and Change Order"). The application for payment was in the amount of \$230,023.37. Of that amount, \$105,157.20 was for alleged approved change work (the "Change Order"). The amounts contained within the September 2016 Application and Change Order were a shock to the Winterhalters based upon Green Life's prior communication that there remained approximately \$1,000 in

additional costs for the Project. A copy of the September 2016 Application and Change Order is attached hereto and incorporate herein as Exhibit "D."

18. Failure by Green Life to Adequately Control the Cost of the Work in Comparison to the Control Estimate and to Otherwise Obtain Approval by the Winterhalters for the Change Order. Green Life has failed to adequately price the cost of the Project in its original control estimate resulting in a change order that seeks to charge the Winterhalters amounts way in excess of the original control estimate. Furthermore, Green Life failed to obtain the approval of the Winterhalters for the Change Order. Instead, Green Life approved changes to the work, subcontractors, materials, etc. on its own and now seeks to charge the Winterhalters for the alleged increase in cost without ever obtaining approval of the same.

19. Repeated Request for Documents Supporting Change Order. The Winterhalters repeatedly requested that Green Life provide the documentation in support of the September 2016 Application and Change Order so that they could make a determination as to the approval of the same.

20. Green Life's Refusal to Provide Documents and Otherwise Comply with its Contractual Obligations. Green Life has refused to provide the documents in support of its payment applications and the Change Order in violation of its contractual obligations. As a result of Green Life's refusal, the Winterhalters have been unable to approve the same.

21. Mismanagement of Funds. Green Life has also mismanaged Project funds by requesting draws for deposits that were more than what was

actually required by suppliers; requesting draws for items that Green Life stated were required to be paid in full at delivery, yet, not paying such suppliers for months after the draw payment; and, overbilling the Winterhalters in amounts that were higher than what Green Life was actually billed by the supplier and/or subcontractor.

22. **Green Life's Failure to Timely Complete the Project.** According to the Contract, Green Life was to achieve substantial completion within Two Hundred Seventy (270) days from the date of commencement, which was May 30, 2014. Section 7.2.1 of the General Conditions states that a change order shall identify the change in the work; the amount of the adjustment, if any, in the contract sum; and the extent of the adjustment, if any, in the contract time, and that such change order shall be signed by the owner and contractor. The Winterhalters never approved any changes to the contract time as required by the Contract.

23. **Quality Issues at the Property.** In addition, numerous quality issues exist at the Project that Green Life was on notice of and had an obligation to remedy.

24. **Termination of the Contract.** On or about October 26, 2016, the Winterhalters exercised their right under the Contract to terminate their contract with Green Life (the "Termination").

25. **Payment of Subcontractors.** Since the Termination, the Winterhalters have paid subcontractors directly who should have been paid by Green Life. In addition, the Winterhalters have paid subcontractors directly to

finish their work at the project and/or to fix quality issues existing at the Project, which were the responsibility of Green Life.

26. **Green Life's Continued Commercial Use of The Winterhalters' Plan and Personal Property Name.** The plans for the Project are owned by and are the property of the Winterhalters. Section 1. 5.1 of the General Conditions, states that the contractor, subcontractor, sub-subcontractors, and material or equipment suppliers shall not own or claim a copyright in the instruments of service, which include the plans for a project. Section 1.5.2 of the General Conditions states that the contractor, subcontractor, sub-subcontractors and material or equipment supplies are authorized to use and reproduce the instruments of service provided to them *solely for execution of the work (emphasis added)*. Furthermore, Section 1.5.2 of the General Conditions state the contractor . . . **may not use the instruments of service on other projects . . . without the specific written consent of the owner (emphasis added)**.

27. **Demand Has Been Made to Not Use the Same.** The Winterhalters have repeatedly requested that Green Life stop using their home and plans for commercial purposes on the Green Life's website and other marketing materials; however, Green Life has refused to take the home or the plans off of its website. In addition, Green Life advertises the home and plans using the personal name given to the Project by the Winterhalters, "Vista del Fiume." The Winterhalters have demanded Green Life cease advertising the plans using the personal name, yet, Green Life has refused to do so.

28. **Claim of Lien Filed by Green Life.** Green Life has filed a claim of lien in the full contract amount (the "Lien"). This is in violation of the Contract, specifically, Article 14, which provides the calculation of any amount owed to the contractor at the time of a termination by the owner. Green Life has failed to provide the information necessary to determine any amount which may be owed to Green Life.

29. **Decisions to Withhold Certificate of Payment.** The Winterhalters have properly withheld payments under Section 9.5.1 of the General Conditions.

30. **Attempts to Rectify Issues with Applications for Payment.** The Winterhalters have also attempted to operate under the contract documents and issue joint checks for work performed by subcontractors; however, Green Life refused to approve payment by joint check.

COUNT I
BREACH OF CONTRACT

31. **Cause of Action.** This is a cause of action for breach of contract against Green Life.

32. **Restatement.** The Winterhalters restate paragraphs 1 through 29 as if fully set forth herein.

33. **Contract.** Green Life and the Winterhalters entered into the Contract. Pursuant to the Contract, Green Life had certain obligations to the Winterhalters.

34. **Breach by Green Life.** Green Life has breached the Contract by:
- a. Failing to obtain approval of the Winterhalters for changes to the work;

- b. Failing to provide documentation required by the Contract to support payment applications and/or change orders;
- c. Failing to account for funds paid to Green Life;
- d. Mismanaging Project funds;
- e. Mismanaging the Project;
- f. Failing to substantially complete the Project in accordance with the Contract;
- g. Failing to pay subcontractors even though the Winterhalters paid Green Life for the subcontractors' work;
- h. Failing to build the home in accordance with contract and/or industry standards;
- i. Using the plans owned by the Winterhalters for Green Life's own personal use and marketing;

35. **Damages.** The Winterhalters have been damaged by Green Life's breach of the Contract.

WHEREFORE, the Winterhalters respectfully requests that this Court enter judgment against Green Life Luxury Homes, LLC as follows:

A. That this Court award the Winterhalters monetary damages of at least \$15,000.00;

B. That this Court temporarily enjoin Green Life from utilizing the Winterhalters' home, plans, or other instruments of service, on its website, marketing materials, and/or in the construction of any other home;

C. That this Court, pending trial on these issues, permanently enjoin Green Life from utilizing the Winterhalters' home, plans, or other instruments of service, on its website, marketing materials, and/or in the construction of any other home;

D. That this Court award the Winterhalters prejudgment interest;

E. That this Court award the Winterhalters all attorney's fees and costs properly taxable under Florida law; and

F. That this Court award the Winterhalters all other relief which is necessary and just under the circumstances.

COUNT II
FRAUDULENT LIEN UNDER FLORIDA STATUTE 713.31

36. **Cause of Action.** This is an action for fraudulent lien under Florida Statute 713.31 against Green Life.

37. **Restatement.** The Winterhalters restate paragraphs 1 through 29 as though fully set forth herein.

38. **Green Life's Knowledge at the time it filed its Lien.** At the time it filed its Lien, Green Life knew:

- a. it had been paid for certain amounts owed to subcontractors;
- b. it had not performed all work under the Contract;
- c. the Owner had solely performed work under the Contract;
- d. it had not obtained change orders in accordance with the Contract;
- e. it had not provided the required documents supporting its payment applications in accordance with the Contract.

39. **Green Life's Willful and Gross Negligence.** Green Life willfully and with gross negligence:

- a. Filed a lien for amounts which it had already been paid;
- b. Attempted to manipulate a cost plus contract by filing a lien which includes amounts for work not performed;
- c. Attempted to manipulate a cost plus contract by filing a lien which includes amount for which there is no contractual basis for payment;

40. **Damages.** The Winterhalters have been damaged as a result of the fraudulent lien.

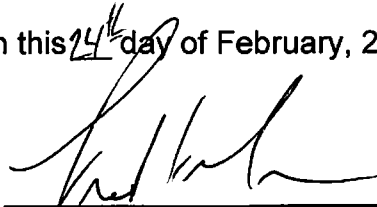
WHEREFORE, the Winterhalters respectfully request that this Court enter judgment against Green Life Luxury Homes, LLC as follows:

- A. That this Court award monetary damages to the Winterhalters;
- B. That this Court award pre and post judgment interest;
- C. That this Court award the Winterhalters their attorney's fees and costs properly taxable under Florida law;
- D. That this Court award the Winterhalters all further relief and damages under under 713.31(2)(C); and,
- E. That this Court award the Winterhalters such further relief as is necessary and just under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by electronic mail to Gregory P. Brown, Esquire at

gregory.brown@hwhlaw.com; Ryan J. Leuthauser, Esquire at
ryan.leuthauser@hwhlaw.com; jill.kuty@hwhlaw.com and
sharon.donofrio@hwhlaw.com, on this 24th day of February, 2016.



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